

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVOOD KHADEMI,

Plaintiff,

v.

NORTH KERN STATE PRISON, et al.,

Defendants.

Case No. 1:21-cv-01261-ADA-SKO (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY PLAINTIFF'S FILING
CONSTRUED AS A MOTION TO REOPEN
THIS ACTION**

(Doc. 23)

14-DAY OBJECTION PERIOD

Plaintiff Davood Khademi is proceeding *pro se* and *in forma pauperis* in this closed civil rights action brought pursuant to 42 U.S.C. § 1983.

I. RELEVANT PROCEDURAL BACKGROUND

Plaintiff filed his original complaint on August 19, 2021. (Doc. 1.)

On September 10, 2021, Plaintiff filed a motion for temporary restraining order and preliminary injunction. (Doc. 11.)

On September 23, 2021, Plaintiff filed a notice of change of address. (Doc. 12.)

On November 4, 2021, Plaintiff filed a motion to set aside the information (Doc. 13), and on December 15, 2021, he filed a motion for appointment of expert psychologist and investigator or attorney (Doc. 14).

On February 2, 2022, Plaintiff filed another notice of change of address. (Doc. 15.)

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1 On April 27, 2022, the undersigned issued Findings and Recommendations to deny
2 Plaintiff's motion for temporary restraining order. (Doc. 16.)

3 On May 2, 2022, the undersigned issued an Order denying Plaintiff's motion to set aside
4 the information and motion to appoint expert and investigator and/or attorney. (Doc. 17.)

5 On May 23, 2022, District Judge Dale A. Drozd issued an Order Adopting Findings and
6 Recommendations and Denying Plaintiff's Motion for a Temporary Restraining Order. (Doc. 18.)
7 The order was served on Plaintiff via U.S. Mail at his address on file with the Court at that time.

8 A docket entry dated June 15, 2022, reflects the Order previously served upon Plaintiff on
9 May 23, 2022, was returned by the United States Postal Service marked "Undeliverable, Return
10 to Sender, and Unable to Forward."

11 The action was reassigned from District Judge Drozd to District Judge Ana de Alba on
12 August 24, 2022. (Doc. 19.)

13 On August 30, 2022, the undersigned issued Findings and Recommendations to Dismiss
14 the Action for Failure to Prosecute and Failure to Keep Court Apprised of Current Address. (Doc.
15 20.) Plaintiff was provided 14 days within which to file any objections. (*Id.* at 4.) Plaintiff failed
16 to file objections. A docket entry dated September 6, 2022, reflects that the Findings and
17 Recommendations were returned by the United States Postal Service marked "Undeliverable,
18 Return to Sender, Not at Facility, Unable to Forward."

19 On September 28, 2022, Judge de Alba issued an Order Adopting Findings and
20 Recommendations to Dismiss This Action for a Failure to Prosecute and Failure to Keep Court
21 Apprised of Current Address. (Doc. 21.) This action was dismissed without prejudice and the case
22 was closed. (*Id.* at 2.) Judgment was entered on that same date. (Doc. 22.)

23 On January 23, 2023, Plaintiff filed an untitled document with this Court, referencing the
24 case number for this action and a Ninth Circuit Court of Appeals case number.¹ (Doc. 23.) The
25 Court construes Plaintiff's most recent filing as a motion to reopen this action.

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28 ¹ The docket entry for this filing reads "Notice of Change of Address to 2351 Sunset Blvd, Suite 170, P.O.
Box 102, Rocklin, CA 95765 by Davood Khademi."

II. DISCUSSION

Plaintiff's filing of January 23, 2023

Plaintiff's filing is unclear. As an initial matter, the caption at the top reads "IN THE NINTH CIRCUIT COURT OF APPEALS." (*See* Doc. 23.) Plaintiff provides a Ninth Circuit case number of "2215054." (*Id.*) It also includes the following: "1:21-cv-01261-ADA-SKO (PC)" and "*Khademi v. N. Kern State Prison*, 1:21-cv-01261-ADA-SKO (PC), (E.D. Cal. Sep. 28, 2022)." (*Id.*) On the left-hand side of the caption, Plaintiff entered "DAVOOD KHADEMI, Appellant/petitioner Vs. Superior Court of California in and for the County of Placer, Defendant/Respondent." (*Id.*)

In the document, Plaintiff states he "is having difficulty to reset or login in his pacer account in order to move forward with this court in the mine time petitioner is filing his extended US court of appeals case for the State court before the third appellate District Court, pending his opening brief." (Doc. 23.) Plaintiff states his "[a]ddress changed after a week of residing in the old address for the reason of his disability on the Grass Valley HWY Road Auburn Ca 95603." (*Id.*) He then states that while he "moved out immediately after a week [he] retained the address of the 2351 Sunset Blvd Suite 170 P.O. BOX 102, Rocklin Ca 95765." (*Id.*)

Plaintiff next contends that "[d]ue to an extremely busy Schedule," he was "not able to access online or gain access to court" despite having "previously filed the motion for stay of the pending case before the State court of appeals." (Doc. 23.) Plaintiff "moves this court due to his financial situation and medical disability requests the change of Address and stay request in the case ND 2215054" as he believes "there is an error in the Eastern District Court Case titles and Case Number's There or before the Ninth Circuit Court of Appeals." (*Id.*) For those reasons, Plaintiff states "Appellant needs extension of time before this court until Appellant can access the Pacer and request the transcripts there of for all the cases filed before the Eastern District of California and The Ninth Circuit Court of California." (*Id.*)

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Analysis

Although Plaintiff does not set forth a rule of procedure, liberally construed, the Court will treat the motion as a Rule 60 motion for relief from judgment or order. Fed. R. Civ. P. 60(b).²

Federal Rule of Civil Procedure 60(b) provides in pertinent part:

Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to more for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

A motion under subsections (1), (2), and (3) of Rule 60(b) must be filed within one year, and motions under the other subsections must be filed “within a reasonable time.” Fed. R. Civ. P. 60(c)(1). Under the catchall provision of Rule 60(b)(6), the Court has the power to reopen a judgment even after one year. *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993).

Reconsideration of a prior order is an extraordinary remedy “to be used sparingly in the interests of finality and conservation of judicial resources.” *Kona Entres., Inc. v. Estate of Bishop*, 229 F.3d 977, 890 (9th Cir. 2000) (citations omitted); *see also Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (addressing reconsideration under Rule 60(b)). In seeking reconsideration under Rule 60, the moving party “must demonstrate both injury and circumstances beyond his control.” *Harvest*, 531 F.3d at 749 (internal quotation marks & citations omitted). “A motion for

² Judgment was entered and the case was closed on September 28, 2022. (Doc. 22.)

1 reconsideration should not be granted, absent highly unusual circumstances, unless the district
2 court is presented with newly discovered evidence, committed clear error, or if there is an
3 intervening change in the controlling law,” and it “may not be used to raise arguments or present
4 evidence for the first time when they could reasonably have been raised earlier in the litigation.”
5 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)
6 (internal quotations marks & citations omitted). Local Rule 230(j) requires, in relevant part, that
7 a movant show “what new or different facts or circumstances are claimed to exist which did not
8 exist or were not shown” previously, “what other grounds exist for the motion,” and “why the
9 facts or circumstances were not shown” at the time the substance of the order which is objected to
10 was considered. Plaintiff’s filing does not identify any basis under Rule 60 to support a
11 reconsideration of the Court’s order dismissing this action.

12 To the extent Plaintiff’s motion can be construed to claim mistake, inadvertence, surprise,
13 or excusable neglect as a basis for relief (Fed. R. Civ. P. 60(b)(1)), such a claim is not persuasive.
14 Plaintiff’s vague reference to a possible mistake or “error” involves his assertion concerning
15 “Case titles and Case Number’s.” Any mistake in that regard is Plaintiff’s own doing.

16 The instant action, despite the caption in Plaintiff’s filing, does not involve the Placer
17 County Superior Court. Plaintiff’s complaint names correctional employees and prison officials at
18 North Kern State Prison and asserts Eighth Amendment claims of excessive force, a lack of
19 medical care and a lack of food. (*See* Doc. 1.) The Ninth Circuit Court of Appeals case number
20 22-15054, titled “Davood Khademi v. Kelly Santoro,” arises from Plaintiff’s appeal in the
21 Sacramento Division case number 2:21-cv-00902-WBS-KJN and judgment entered by District
22 Judge William B. Shubb on October 28, 2021. In that habeas corpus action following Khademi’s
23 conviction in the Placer County Superior Court, respondent’s motion to dismiss Khademi’s
24 petition for writ of habeas corpus as premature was granted and the action was dismissed without
25 prejudice. (2:21-cv-00902, docket entry number 47.)

26 Plaintiff did not appeal Judge de Alba’s September 28, 2022, “Order Adopting Findings
27 and Recommendations to Dismiss This Action for a Failure to Prosecute and Failure to Keep
28 Court Apprised of Current Address” in this civil rights action. Thus, Plaintiff’s appeal before the

1 Ninth Circuit Court of Appeals concerns the judgment in the Sacramento Division case—not the
2 judgement in this case.

3 Plaintiff’s assertion that he “retained the address of the 2351 Sunset Blvd Suit[e] 170 P.O.
4 BOX 102, Rocklin Ca 95765” after leaving the Auburn California address is misplaced. When
5 Plaintiff filed his complaint in this case in August 2021, he was incarcerated at Kern Valley State
6 Prison in Delano. (Doc. 1.) The following month, Plaintiff filed a change of address indicating he
7 had been moved to Salinas Valley State Prison. (Doc. 12.) In February 2022, Plaintiff filed
8 another notice of change of address, reflecting a move from Salinas Valley State Prison to
9 Atascadero State Hospital. (Doc. 15.) When the undersigned recommended dismissal of this
10 action for Plaintiff’s failure to keep the court apprised of his current address, the address on file
11 with the Court was Atascadero State Hospital. Prior to January 23, 2023, Plaintiff did not advise
12 this Court of his Sunset Boulevard address in Rocklin, California. Therefore, service on Plaintiff
13 at the Atascadero State Hospital was proper since there was no notice of the Rocklin, California
14 address.

15 Plaintiff’s statement concerning his “extremely busy schedule” does not excuse his failure
16 to keep this Court apprised of his current address and his failure to prosecute this action.
17 Plaintiff’s statement that he was unable to access Pacer or file electronically is also misplaced
18 because Plaintiff did not have this Court’s permission to file documents electronically in this case.
19 *See* Local Rule 183(c) (“Pro se parties must file documents conventionally, and any person
20 appearing pro se may use electronic filing only with the permission of the assigned Judge”). Thus,
21 this Court cannot conclude the judgment entered on September 28, 2022, should be set aside due
22 to mistake, inadvertence, surprise, or excusable neglect. Plaintiff has made no showing of newly
23 discovered evidence or fraud (*see* Fed. R. Civ. P. 60(b)(2) & (3)), and neither subsection (4) or
24 (5) of Rule 60(b) appear to be applicable here. In any event, Plaintiff makes no such showing and
25 no other reason justifies relief. Fed. Civ. P. 60(b)(6).

26 In sum, Plaintiff has not set forth facts or law to support a request for reversal of the
27 Court’s prior decision. Fed. R. Civ. P. 60(b); Local Rule 230(j). There are no extraordinary or
28 highly unusual circumstances justifying relief. *Kona Entres., Inc. v. Estate of Bishop*, 229 F.3d at

890; *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d at 880. The undersigned will therefore recommend Plaintiff's filing, construed as a motion to reopen this action, (Doc. 23), be denied.

III. FINDINGS AND RECOMMENDATIONS

For the reasons set forth above, it is recommended that Plaintiff's filing or motion dated January 23, 2023, (Doc. 23), be denied.

These Findings and Recommendations will be submitted to the district judge assigned to this case, pursuant to 28 U.S.C. § 636(b)(1). **Within 14 days** of the date of service of these Findings and Recommendations, a party may file written objections with the Court. The document should be captioned, "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may result in waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **February 16, 2023**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE